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No. 05-7664

In the Supreme Court of the United States

REYMUNDO TOLEDO-FLORES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND FAMILIES AGAINST MANDATORY MINIMUMS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(2)'s definition of "drug trafficking crime" includes only those offenses punishable as felonies under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.[2]

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[1] Pursuant to Rule 37.6, Amici Curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Published decisions in which the Association has appeared as *amicus curiae* in this Court include *Castillo v. United States*, 530 U.S. 120 (2000); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Massaro v. United States*, 538 U.S. 500 (2003); *United States v. Booker*, 543 U.S. 220 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); and *United States v. Grubbs*, 126 S. Ct. 1494 (2006).

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization with 10,000 members and thirty chapters nationwide. FAMM does not oppose imprisonment, but urges that punishment be proportionate to the offense and the culpability of the offender. FAMM conducts research, promotes advocacy, assists prisoners with securing *pro bono* counsel, and educates the public regarding the excessive cost of mandatory sentencing. That cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the increasing reliance on lengthy periods of incarceration to the detriment of other responses to crime. FAMM is deeply interested in ensuring that prisoners spend no more time incarcerated than that authorized by law.

Amici Curiae file this brief because Petitioner Toledo-Flores's case[3] raises an important question of statutory construction that will impact sentencing for many indigent federal defendants. That question potentially turns upon the application of the rule of lenity. Amici Curiae offer their view as to the role the rule of lenity could play in the resolution of this question.

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[3] Amici Curiae submit this brief on behalf of Petitioner Toledo-Flores. His case has been consolidated for purposes of oral argument with *Lopez v. Gonzales*, No. 05-547.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case primarily concerns the portion of 18 U.S.C. § 924(c) that defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act . . . ." 18 U.S.C. § 924(c)(2). The lower courts have split as to whether the term "felony" therein refers only to offenses punishable as felonies under federal law (the Federal Felony Approach) or whether it extends to all offenses punishable as felonies under state law, including those for simple possession of drugs (the State Felony Approach). *Compare, e.g., United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005), *with United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).

Amici Curiae believe that the plain language of § 924(c)(2) reaches only felonies under federal law, as the petitioners and other *amici* have explained. And, at the very minimum, the statute forecloses the State Felony Approach adopted by the Fifth Circuit. Because these arguments are clear and the meaning of the statute is unambiguous, no purpose would be served by revisiting those points here. Amici Curiae focus instead on the rule of lenity. Here, as it often does, lenity serves as a secondary argument showing why the Court, even if it were to decide that the statute is ambiguous, cannot adopt the Government's harsher interpretation of the statute.

The rule of lenity is deeply rooted in our justice system, ensuring that fair notice is given, that laws are not enforced

arbitrarily, and that the executive, legislative and judicial branches maintain their proper roles. To satisfy the rule of lenity and its underlying concerns, the Court should reject the Government's argument for the State Felony Approach. Thousands of potentially affected individuals have been given actual notice of a contrary interpretation by the Government. The State Felony Approach is counterintuitive and impermissibly depends in part on intimations as to general legislative policy rather than the specific question of statutory construction. Applying the rule of lenity will avoid reliance on anything but the clear meaning of the legislation, and will allow for uniform, nationwide application of 18 U.S.C. § 924(c), 8 U.S.C. § 1101(a)(43)(B), and U.S. Sentencing Guideline § 2L1.2.[4]

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[4] Although it is not necessary for the Court to reach the issue to resolve the case of either petitioner, Amici Curiae note that the pertinent federal statutes should not be construed to reach *every* state drug offense that could be punished as a felony under federal law. As explained in other briefs before the Court, the Immigration and Nationality Act's term "aggravated felony" encompasses only state drug offenses that (1) are felonies and (2) include an element of trafficking. Amici Curiae fully support that interpretation and believe that the rule of lenity requires its adoption.

ARGUMENT

ANY AMBIGUITY IN THE STATUTE MUST BE RESOLVED IN THE PETITIONER'S FAVOR USING THE RULE OF LENITY

Section 924(c) of Title 18 of the United States Code defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act . . . ." 18 U.S.C. § 924(c)(2). Petitioner Toledo-Flores persuasively argues that the plain language of this definition does not reach a state felony conviction for the simple possession of drugs. Should the Court find the statute ambiguous, however, the rule of lenity requires that it be construed in Petitioner Toledo-Flores's favor. Lenity will defeat the inconsistent interpretations that have been urged by the Government and adopted by the lower courts, and it will ensure uniform, nationwide application of the statute in all contexts.

A. Section 924(c)'s term "drug trafficking crime" has a long and troublesome history of inconsistent interpretation.

Since 1990, interpretation of the phrase "drug trafficking crime" has vacillated between two inconsistent readings. The first reading — the Federal Felony Approach[5] — interprets the term in its native context of

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[5] Courts have sometimes called this the "Hypothetical Federal (continued...)

Title 18 and section 924(c). Under this approach, a conviction for simple possession of drugs will qualify as an aggravated felony only if it is punishable as a felony under the designated federal laws. The second reading — the State Felony Approach — expands Title 18's "drug trafficking crime" by cross-referencing a definition of "felony" found in Title 21. *See* 21 U.S.C. § 802(13). Under that approach, a conviction for simple possession will be a drug trafficking crime (and an aggravated felony) whenever the offense involves a federally prohibited drug and is classified as a felony by the state.

The vacillation between these approaches was in large part fostered by the Government, which endorsed the Federal Felony Approach in the immigration context while urging the State Felony Approach in the criminal sentencing context. Eventually, the case law splintered, with some circuits interpreting the statute differently depending on the context in which it arose. Such inconsistency has led to disparate treatment for thousands of persons facing deportation or imprisonment. It could lead even to disparate treatment of the same person, depending on the stage of litigation she faces. And while the courts have more recently tried to interpret the statute based on its text, serious problems of inconsistency remain.

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[5] (...continued)
Felony Approach," *see, e.g.*, *United States v. Palacios-Suarez*, 418 F.3d 692, 695 (6th Cir. 2005), but the shortened label will be used here.

1. The Government-fostered interpretive split.

In a series of immigration cases from 1990 to 1995, the Board of Immigration Appeals adopted the Federal Felony Approach. *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990); *Matter of Davis*, 20 I. & N. Dec. 536 (BIA 1992); *In re L– G–*, 21 I. & N. Dec. 89 (BIA 1995).[6] The United States Attorney General had the authority to *sua sponte* overrule *In re L– G–* and to adopt the State Felony Approach. 8 C.F.R. § 3.1(h) (1995); *see, e.g., Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 288 (A.G. 1991) (reversing BIA and issuing binding precedent where "no plausible understanding" of the law would support BIA's decision). The Attorney General could also have appealed the decision to federal court. *See Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996). The Attorney General did neither. *See id.* Instead, the Attorney General let stand the Federal Felony Approach, and, based on that interpretation, the Department of Justice processed thousands of aliens nationwide.[7]

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[6] This interpretation took a fully nationwide effect when the Second Circuit, in light of *In re L– G–*, changed course and adopted the Federal Felony Approach in the immigration context. *Aguirre v. INS*, 79 F.3d 315, 318-19 (2d Cir. 1996).

[7] Almost 80,000 people were deported in fiscal year 2003 on crime-related grounds. Office of Immigration Statistics, U.S. Dep't of Homeland Security, *2003 Yearbook of Immigration Statistics* 165, Table 43, *available at* http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf.

Federal prosecutors nevertheless argued for the State Felony Approach in criminal cases turning upon precisely the same question of statutory interpretation resolved in the immigration context.[8] This strategy succeeded in the First Circuit, the first court of appeals to consider the issue after the BIA had adopted the Federal Felony Approach. *See United States v. Restrepo-Aguilar*, 74 F.3d 361, 363 (1st Cir. 1996). The court addressed § 924(c)(2) in the context of the "aggravated felony" definition of 8 U.S.C. § 1101(a)(43)(B) and U.S. Sentencing Guideline § 2L1.2. The court adopted the State Felony Approach. *Id.* at 364. Referring to *dicta* from prior decisions, it held, "We adhere to this established interpretation and reject the defendant's contrary construction." *Id.* at 364.[9] The court did not address the rule of lenity, or the Attorney General's decision to let stand *In re L– G–*.

After becoming an "established interpretation," the First Circuit's *dicta* snowballed. The next four circuits to rule on the issue in the § 2L1.2 context followed the First Circuit. *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States v. Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997); *United States v. Simon*,

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[8] The interpretation of § 924(c)(2) must be the same regardless whether the question arises in the immigration or criminal context. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see generally United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992).

[9] *See In re L– G–*, 21 I. & N. Dec. at 97 n.5 (explaining the First Circuit's *dicta*).

168 F.3d 1271, 1272 (11th Cir. 1999). None of those circuits offered an independent or close analysis of the text interpreted; none addressed the Attorney General's decision to let stand the Federal Felony Approach in immigration cases; and none mentioned the rule of lenity. The inconsistency between the immigration cases and the criminal sentencing cases deepened in *United States v. Pornes-Garcia*, where the Second Circuit, which had adopted the Federal Felony Approach in the immigration context, decided to follow the State Felony Approach in the criminal context, despite the intracircuit incongruity it would create. 171 F.3d 142, 147 (2d Cir. 1999). And each year, the inconsistency affected more defendants, as the number of individuals sentenced under § 2L1.2 grew exponentially.[10]

2. The consequences of the entrenched immigration/criminal split.

As a result of the disparate interpretations endorsed by the Government, a consequential split developed. In the immigration context, the Federal Felony Approach was applied nationwide. But in the criminal context, the State Felony Approach had been adopted by five circuits. Thus,

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[10] *Compare* U.S. Sentencing Comm'n, *1992 Annual Report*, Table 24 (711 defendants sentenced under § 2L1.2), *with* U.S. Sentencing Comm'n, *1999 Sourcebook of Federal Sentencing Statistics*, Table 17 (5,658 such defendants). By recent figures, over one-fifth of all federal prison sentences are imposed on defendants convicted of immigration offenses. U.S. Sentencing Comm'n, *2003 Sourcebook of Federal Sentencing Statistics*, Table 3, Figure A.

for example, an alien with a state felony conviction for simple possession could be advised in immigration proceedings culminating in deportation that her prior conviction *was not* an aggravated felony.[11] But if that same alien returned to the United States and was, like Petitioner Toledo-Flores, prosecuted for illegal reentry, then she was likely to receive a longer sentence based on the conclusion that the very same simple possession conviction *was* an aggravated felony. That is, this individual would likely be subjected to a much longer sentence at the behest of a Department of Justice official whose position directly conflicted with that of the last Department official to advise and act upon her.

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[11] Although an aggravated felony is often a basis for deportation, there are several specific situations in which a deported alien could have been advised by an immigration judge or official that his or her prior simple possession conviction was *not* an aggravated felony. For example, this could occur when: (1) the immigration judge or official decided that a prior simple possession conviction was not an aggravated felony and thus not a bar to applying for a discretionary waiver to deportation, yet the alien was ultimately denied the waiver, *see* 8 U.S.C. § 1229b(a); (2) the immigration judge or official decided a prior simple possession conviction was not an aggravated felony and thus not a bar to applying for asylum, yet the alien was ultimately denied asylum, *see id.* § 1158(a); or (3) the immigration judge or official decided that a prior simple possession conviction was not an aggravated felony and thus did not trigger automatic pre-hearing detention on that basis, yet the alien was ultimately deported, *see id.* § 1226(c)(1)(B).

3. The trend towards textualism and leniency.

Beginning with Judge Canby's dissent in *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1343 (9th Cir. 2000), federal courts have performed a closer reading of the statutory text when interpreting § 924(c)(2). Most of these courts have either rejected the State Felony Approach, *see Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006); or, at times constrained by precedent, they have limited its application, *see United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002); *Liao v. Rabbett*, 398 F.3d 389 (6th Cir. 2005); *United States v. Amaya-Portillo*, 423 F.3d 427, 435-36 (4th Cir. 2005). *But see United States v. Wilson*, 316 F.3d 506 (4th Cir. 2003) (adopting State Felony Approach); *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005) (applying its previously-adopted State Felony Approach in immigration context), *cert. granted*, 126 S. Ct. 1651 (2006). In a case arising in the criminal context, Judge Nelson opined that the rule of lenity should decisively resolve the question in favor of the defendant. *Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring).

B. The rule of lenity and its underlying principles.

The rule of lenity provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). Or, in the context of determining the

proper punishment under a statute, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not be imposed." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (stating that "one is not to be subject to a penalty unless the words of the statute plainly impose it") (internal quotations omitted).

Lenity has profound implications for the interpretive process because it derives from the principle of legality itself — *nulla poena sine lege* ("there can be no punishment without law"). *See generally* Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968) (describing the rule of lenity and the vagueness doctrine as "devices worked out by the courts to keep the principle of legality in good repair"); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that enforcement of overly vague criminal statutes "violates the first essential of due process of law"). As explained below, lenity's underlying principles necessarily inform the interpretation of penal statutes, and they promote consistency and fairness in the application of the criminal code.

1. The roots of the venerable rule.

The rule of lenity has been called "venerable" because of its age and the respect it commands. *See R.L.C.*, 503 U.S. at 305; *see generally Rogers v. Tennessee*, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting) (noting that "the maxim *nulla poena sine lege* . . . 'dates from the ancient Greeks' and has been described as one of the most 'widely

held value-judgments in the entire history of human thought'") (brackets omitted). Blackstone commented on the vigorous role it played in limiting criminal punishment in sixteenth- and seventeenth-century English courts. William Blackstone, *Commentaries on the Laws of England* 88. He described the rule as one of strict construction: "Penal statutes must be construed strictly." *Id.*

The rule of strict construction emerged in American courts in *United States v. Wiltberger*, 18 U.S. 76 (1820), which bears some resemblance to the instant case because in both cases the government sought a broad interpretation of the term in question based on a cross-reference to a distinct statutory provision. Chief Justice John Marshall stated that it was an "extreme improbability" that Congress did *not* intend for the meaning based on the cross-reference. *Id.* at 105. Yet, writing for the Court, he rejected the government's argument. The Chief Justice instead adhered to the rule of strict construction, explaining that the rule's underlying policies required a narrow, consistent interpretive approach to penal statutes:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It

> is the legislature, not the Court, which is to define a crime, and ordain its punishment.

Id. at 95. The Chief Justice acknowledged the courts' natural temptation to apply a statute in a way believed best to achieve the statute's policy, despite textual limitations. But yielding to such temptation did not provide persuasive authority. To the contrary, if such an interpretive maneuver had been executed previously, it must have been "in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." *Id.* at 96.

In *McBoyle v. United States*, 283 U.S. 25 (1931), Justice Oliver Wendell Holmes emphasized the fair-notice rationale for the rule. Such notice must be provided even if defendants did not actually read the United States Code:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27. Justice John Marshall Harlan II reiterated this point thirty-five years later. "The policy thus expressed [by the rule of lenity] is based primarily on a notion of fair

play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand." *United States v. Standard Oil Co.*, 384 U.S. 224, 236 (1966) (Harlan, J., dissenting).

2. The rule's purposes in modern criminal jurisprudence.

Modern cases recognize that the rule of strict construction — now known as the rule of lenity — has three fundamental purposes: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Each of these purposes is essential to the proper functioning of our criminal justice system.

The first purpose is to ensure fair notice. Warning must be given "'to the world in language that the common world will understand.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle*, 283 U.S. at 27). And although it is typically fictitious to assume that wrongdoers read statutes, fair notice is nevertheless "required in any system of law." *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). Indeed, as explained above, fair notice is closely tied to the principle of legality itself.

Two ramifications stem from this need for fair notice. First, a premium is put on the commonsense meaning of a statute. *See, e.g., McBoyle*, 283 U.S. at 27. It is inherently unfair to impose on "the common world" a statutory interpretation that is overly obscure or clever. Second, a premium is put on the text itself. Judges should not rely on extratextual considerations to construe an unclear criminal statute against a defendant. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990). The rule of lenity "preclude[s] our resolution of [an] ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990).[12]

Lenity's second purpose is to preserve the separation of powers. *See Bass*, 404 U.S. at 348. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* "This policy embodies the

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[12] There has been debate within the Court as to whether the rule of lenity should play its decisive role before or after recourse to legislative history. *See R.L.C.*, 503 U.S. at 306 n.6 (plurality opinion). Amici Curiae believe that this question regarding the rule's precise relationship to legislative history need not be resolved here because, as argued in the principal brief, legislative history strongly supports the less harsh interpretation.

instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (citation omitted). "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result. . . . This admonition takes on a particular importance when the Court construes criminal laws." *United States v. Granderson*, 511 U.S. 39, 68-69 (1994) (Kennedy, J., concurring) (internal citations omitted). Lenity prevents the imposition of punishments that are not clearly authorized by Congress, the only branch of government competent to establish criminal penalties.

Lenity's third purpose is to avoid arbitrariness and inconsistency in the enforcement of criminal statutes. *See Kozminski*, 487 U.S. at 952. The rule of lenity responds to this need by "fostering uniformity in the interpretation of criminal statutes." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). It fosters uniformity because, in each case of criminal statutory interpretation, it requires courts to examine the text for ambiguity and to resolve any such ambiguity in the same direction. *See generally id*; *Crandon*, 494 U.S. at 175-78 (Scalia, J. concurring); William N. Eskridge, Jr., *Formalism and Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-79 (1999) (suggesting that adherence to the rule of lenity could "generate greater objectivity and predictability in statutory interpretation"). Faithfully applied, the rule of lenity prevents the sovereign from punishing individuals

based on an innovative or less-than-unambiguous reading of the criminal code.

C. By its own actions, the Government has effectively conceded that its current interpretation is not clear enough to survive application of the rule of lenity.

As explained at the outset, Amici Curiae do not believe that the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2) is ambiguous. The definition is clouded only if one chooses to cross-reference the definition of "felony" found in Title 21. That cross-reference is improper. *Gerbier v. Holmes*, 280 F.3d 297, 309-10 (3d Cir. 2002); *United States v. Palacios-Suarez*, 418 F.3d 692, 698 (6th Cir. 2005); *Gonzales-Gomez v. Achim*, 441 F.3d 532, 534 (7th Cir. 2006). Even if it were permitted, however, any ambiguity would have to be resolved under the rule of lenity by adopting the reasonable interpretation most favorable to Petitioner Toledo-Flores. This favorable interpretation is particularly appropriate here, as it avoids the unfairness occasioned by the Government's inconsistent applications of the statute.

In past cases, this Court has noted government equivocation when resorting to the rule of lenity. *See, e.g.*, *Simpson v. United States*, 435 U.S. 6, 14-16 (1978); *Prince v. United States*, 352 U.S. 322, 327 n.7, 329 (1957). In *Simpson*, the Court found it significant that the Department of Justice had originally directed its attorneys to apply a more lenient interpretation, which the government then

argued against in the case before the Court. 435 U.S. at 16. Similarly in *Prince*, the Court found it significant that in a previous case the government had conceded that the harsh interpretation it presently sought was erroneous. 352 U.S. at 327 n.7.

This case presents a similar scenario. Contrary to its position before this Court, the Government previously has accepted the Federal Felony Approach as a reasonable interpretation. The Attorney General declined to reverse or appeal the BIA's decision in *In re L– G–*, thereby permitting immigration cases nationwide to be adjudicated based on the Federal Felony Approach. Federal prosecutors nevertheless sought application of the State Felony Approach at criminal sentencings. Such inconsistent actions were contrary to the rule that the same statutory provision must be given the same meaning in immigration and criminal contexts. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see generally United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992). But they were also a tacit acknowledgment that the BIA's interpretation was reasonable — and thus that there was at least enough ambiguity for the rule of lenity to resolve the question in a defendant's favor.[13]

The Government's inconsistent interpretations also strengthen the practical argument for applying the rule.

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[13] Notably, a rule of lenity exists in immigration law that is similar to the criminal rule. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Typically, the concern for fair notice has weight only in the abstract because it rests on the necessary fiction that offenders read statutes. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). But in this case, the fair-notice problem is concrete. Many defendants similarly situated to Petitioner Toledo-Flores received actual notice from the Department of Justice in the course of deportation proceedings that their prior simple possession convictions were *not* aggravated felonies. Yet when they reenter the United States, these defendants face harsher penalties based on the opposite conclusion.

Accordingly, the fair-notice concern must weigh especially heavily in favor of Petitioner Toledo-Flores. While it is fundamentally unfair to punish an individual in a way that a statute does not clearly provide, it is even worse to impose that punishment when the Executive deliberately has given actual notice of, and has adjudicated thousands of cases under, a contrary interpretation of the statute. *See generally United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) ("Thus, to the extent that the [administrative] regulations [stating a contrary interpretation of the law] deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."); *Raley v. Ohio*, 360 U.S. 423, 438 (1959) (reaching a similar conclusion).

D. The Government's interpretation subverts the rule of lenity and its underlying principles.

1. The Court should avoid an interpretation of a criminal statute harsher than that grasped by commonsense.

Because it is important for criminal statutes to speak in a language that the "common world" understands, Petitioner Toledo-Flores's argument concerning the commonsense meaning of "drug trafficking crime" carries special weight. Under the Government's view, a drug trafficking crime is committed by a person who possesses even the smallest amount of a drug whenever the State labels the offense a felony. This proposition is counterintuitive. The commonsense meaning of "traffic" is not simple possession but rather engaging in an activity related to commerce. *See, e.g.*, *Hallet v. Jenks*, 7 U.S. 210, 219 (1805) (Marshall, C.J.) (statutory prohibition on trafficking with the French implied intentional commerce); *Webster's Third New International Dictionary* 2422 (1986) (defining "traffic" as "commercial activity usu. involving import and export trade"); U.S.S.G. § 2L1.2, comment. (n.1(B)(iv) (similar definition for "drug trafficking offense")); *see also United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000) (Canby, J., dissenting) ("[C]ommon sense rebels at the thought of classifying bare possession of a tiny amount of narcotic as a drug trafficking crime . . . ."). Because the common world cannot be expected to perceive the government's

interpretation of "traffic," the rule of lenity properly requires the Court to avoid it.[14]

2. The Court should avoid relying on general policy statements to support an interpretation that is harsher than clearly required by the statute.

Except in rare cases, it is improper to construe a criminal statute against a defendant on the basis of general policy statements. *See Crandon v. United States*, 494 U.S. 152, 160 (1990); *Hughey v. United States*, 495 U.S. 411, 422 (1990). But courts have relied on such general policy statements when construing § 924(c)(2) against defendants like Petitioner Toledo-Flores. Two instances of such reliance bear comment.

First, courts have relied on a belief that the State Felony Approach comports with a "foundational premise" of the Sentencing Guidelines that, in the calculation of a defendant's criminal history category, "a defendant's history of criminal activity in violation of state law is to be treated on a par with his history of crimes committed in violation of federal law." *United States v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996) (emphasis omitted); *see also Ibarra-Galindo*, 206 F.3d at 1340. But

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[14] Furthermore, as urged by in other briefs before the Court, the Court should interpret "trafficking" within the phrase "illicit trafficking in a controlled substance," 8 U.S.C. § 1101(a)(43)(B), to mean precisely what it commonly means.

neither the INA's definition of "aggravated felony" nor § 924(c)'s definition of "drug trafficking crime" were written with any relation to the general policy for calculating criminal history under Chapter Four of the Sentencing Guidelines. Indeed, the application of these definitions in Petitioner Toledo-Flores's case involved a Chapter Two enhancement. *See* U.S.S.G. § 2L1.2(b)(1)(C). Lenity prohibits reliance on that general policy to resolve this specific question of statutory construction.

Second, the Second Circuit has suggested that the relatively harsh State Felony Approach is appropriate because "[i]n recent years, Congress has substantially increased maximum sentences authorized for the offense of illegal reentry following felony convictions." *United States v. Pornes-Garcia*, 171 F.3d 142, 148 (2d Cir. 1999). But, as this Court stated in an analogous situation, it is not possible to "divine from the legislators' many 'get tough on drug offenders' statements any reliable guidance to particular provisions." *United States v. Granderson*, 511 U.S. 39, 49 (1994). Congress's pursuance of a "get tough on illegal reentry" policy from 1996 to 1999 cannot resolve the specific question of statutory interpretation presented by 18 U.S.C. § 924(c)(2). To the contrary, if the punitive purpose of a penal statute were grounds for a broad construction, then the rule of lenity would be turned on its head.

E. The rule of lenity should have restrained courts from adopting the State Felony Approach.

The rule of lenity is fundamentally a rule of judicial restraint. The purpose of any penal statute is to punish wrongdoers. And so judges aiming to advance that purpose will be tempted to stretch the letter of criminal statutes. *United States v. Wiltberger*, 18 U.S. 76, 96 (1820); *Bifulco v. United States*, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (indicating that the rule of lenity responds to "[our] temptation to exceed our limited judicial role and do what we regard as the more sensible thing"); *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted."). But the rule of lenity counteracts that temptation by requiring courts to hew to the text, eschew arguments based on general policies, place a premium on commonsense, and, of course, resolve any ambiguity in the defendant's favor. *See id.*

In the history of § 924(c)(2)'s inconsistent interpretation, consideration of the rule of lenity and its underlying principles is largely absent. Six circuit court decisions between 1996 and 1999 established the State Felony Approach after the BIA had adopted the Federal Felony Approach. *See supra* at pages 8 to 9. None addressed the rule of lenity. *Cf. Bifulco*, 447 U.S. at 400 n.17 (noting that failure to address rule of lenity may render the lower courts' relatively harsh interpretation questionable). None fully addressed the BIA's textual

interpretation, and most did not even mention the BIA's holding or any textual argument contrary to the State Felony Approach. None noted that the Attorney General had acceded to the Federal Felony Approach. Even if the statute was ambiguous, the vexatious splits between circuits, within circuits, and between criminal and immigration courts could have been avoided by adherence to the rule of lenity.

CONCLUSION

If the statutory meaning is unclear, the rule of lenity mandates the adoption of the most lenient reasonable interpretation of the statute. At a minimum, it requires the Court to reject the State Felony Approach. It is respectfully requested that the Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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